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Torts - Contributory Negligence Where Plaintiff Incurs Risk to Prevent Harm to Others When No Specific Person Is in Danger

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Torts—Contributory Negligence Where Plaintiff Incurs Risk to Prevent Harm to Others When No Specific Person Is in Danger.—Defendant operated a rural power line consisting of two heavily charged wires strung on cross-arms on wooden poles. During the night a storm caused one of the poles to break at the base and fall half way across a public road. Next morning plaintiff attempted to remove the pole to prevent possible injury to anyone who might pass along the road. In doing this he was rendered unconscious, and sustained severe burns. In an action for damages against the power company defendant contended that plaintiff was guilty of contributory negligence as a matter of law in attempting to remove the pole when no emergency existed. The court refused so to charge, and there was a verdict for plaintiff.

Held, judgment affirmed. To relieve a person from a charge of contributory negligence as a matter of law in attempting to save persons or property from harm, it is sufficient if, to a reasonably prudent person, the existing circumstances create the apprehension of danger even though danger to a definite person or a definite property was not actually imminent at the moment. *Wolfinger* v. *Shaw,* 292 N.W. 731 (Neb. 1940).

Where a specific person is in imminent danger of death or serious bodily injury it is not contributory negligence for another to expose himself to danger in order to rescue the imperiled person if, under the same or similar circumstances, an ordinarily prudent person might so have exposed himself. It was so held where plaintiff's intestate ran in front of a train to save a small child who would have been crushed by the rapidly approaching train if not rescued. In affirming a judgment for plaintiff the court said that under the circumstances it was not wrongful for deceased to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. *Eckert* v. *Long Island R. R. Co.,* 43 N.Y. 502, 3 Am. Rep. 721 (1871).

Where plaintiff was injured while walking along a railroad trestle to rescue his cousin who had just been flung from a train in which both were riding, it was held that plaintiff was not guilty of negligence as a matter of law, and that the question as to whether plaintiff's act was foolhardy or reasonable was a matter for the jury. *Wagner* v. *International R. Co.,* 232 N.Y. 176, 133 N.E. 437, 19 A.L.R. 1 (1921).

Where plaintiff rushed into the path of a vicious boar in order to protect her five-year-old daughter from attack, and was herself severely bitten, it was held that she was not guilty of contributory negligence in exposing herself to danger in order to rescue the child, and the jury was allowed to take into its consideration the maternal instinct which prompted the act. *Morgan* v. *Treadwell,* 126 S.W. (2d) 888 (Tenn. 1939).

The rule that a person may expose himself to danger in order to save another in danger of death or serious injury has been followed in an analogous rule in regard to the rescue of chattels from injury or destruction. Thus, where plaintiff was injured in an attempt to save stock from death in a barn set afire by defendant's negligent act, it was held, in reversing a judgment for defendant, that it is the duty of everyone to use reasonable efforts to preserve property from threatened destruction. However, the court pointed out, a person would not be justified in exposing himself to as great a danger to save property as he would to save human life. *Liming* v. *Illinois Central R. Co.,* 81 Iowa 246, 47 N.W. 66 (1890). Wisconsin is in accord with this doctrine, holding that the fact that a railway engineer stayed at his post in order to save his employer's train from destruction, although he had a chance to jump and save himself, would not justify the court in holding him negligent as a matter of law. *Cotrill* v. *C., M. &*

St. P. R. Co., 47 Wis. 634, 3 N.W. 376 (1879). Where plaintiff, in an attempt to prevent a collision between two of his employer's freight cars, boarded one of the cars to set the brake and was crushed between them before he could reach the top, it was held that there was sufficient doubt as to his negligence to entitle him to have the question submitted to the jury. *Kelly* v. *C., M. & St. P. R. Co.*, 50 Wis. 381, 7 N.W. 291 (1880).

The rule is not so well settled, however, in cases where the plaintiff exposes himself to danger in attempting to eliminate a dangerous condition or situation, although at the moment no definite person or chattel is in imminent danger of death or injury because of that condition or situation. The precedent on which the principal case is based is one where plaintiff's intestate was killed in voluntarily attempting to remove a heavily charged broken wire from the street with a pair of insulated pliers at a time when there was no one in immediate danger of harm. There the court said that the test of his conduct is the exercise of reasonable precautions to protect himself under the circumstances, and that it could not be said as a matter of law that deceased had not used such precautions. *Workman* v. *Lincoln Telephone & Telegraph Co.*, 102 Neb. 191, 166 N.W. 550 (1918).

New York has followed this doctrine in two wrongful death actions, both arising from fatal attempts to stop runaways, although in neither case was any specific person in imminent danger. In the one case the attempt was made in a street which, about a half block away, was filled with school children toward whom the horse was running. Here the court said the case did not differ in principle from the situation in which a definite person is rescued. *Manthey* v. *Raunbuehler*, 71 App. Div. 173, 75 N.Y. Supp. 714 (1902). In the second case the attempt was made on a "measurably busy street." *Holloran* v. *City of New York*, 168 App. Div. 409, 153 N.Y. Supp. 447 (1915).

Where plaintiff's intestate was killed in attempting to stop a horse which was running away on a deserted residential street, it was held, in reversing a judgment for plaintiff, that the rule applies only to those cases in which the surrounding circumstances and conditions afford a reasonable basis for the belief that it is necessary to take such a risk in order to save another from death or personal injury. *Devine* v. *Pfaelzer*, 277 Ill. 255, 115 N.E. 126, L.R.A. 1917C, 1080, 16 N.C.C.A. 167 (1917). Where plaintiff was injured in attempting to pick up from the ground a live wire with which some boys were playing, so that they might not be hurt, he was held negligent as a matter of law in unnecessarily taking hold of what he knew to be a live wire. Here, however, the plaintiff knew he was picking up a live wire when no emergency existed, assuming, without any real knowledge, that he would be protected by the insulation. *Billington* v. *Eastern Wisconsin Railway and Light Co.*, 137 Wis. 416, 119 N.W. 127 (1908).

Where plaintiff was severely burned in attempting to pick up a fallen wire, using only a napkin for insulation, in order to protect from possible injury children playing 25 or 30 feet away, it was held that plaintiff was negligent as a matter of law. *Barnett* v. *Des Moines Electric Co.*, 10 F. (2d) 111, (C.C.A. 8th, 1925). In that case the court cited *Workman* v. *Lincoln Telephone and Telegraph Co., supra,* and said of it: "This case fairly supports the contention of plaintiff. In our judgment, however, it is unsound, and out of line with the great weight of authority."

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